APPENDIX.

MEMORANDUM OF THE DISTRICT COURT RE MOTION OF DEFENDANT FOR JUDGMENT OF ACQUITTAL AND, IN THE ALTERNATIVE, FOR A NEW TRIAL.

(Filed June 14, 1957.)

WEICK, *J.*:

The defendant has been tried and convicted three times of the crime of perjury.

The two previous convictions were reversed by the Court of Appeals for errors of law occurring at the trials. *Spaeth v. United States*, 218 F. 2d 361 (CA 6); *Spaeth v. United States*, 323 F. 2d 777 (CA 6).

Defendant has now filed a motion for judgment of acquittal and in the alternative for a new trial to obtain relief from his third conviction.

The principal ground urged in support of the motion is that the evidence at the third trial was insufficient to support the verdict of the jury. The defendant asserts that there was no proof of any intent or motive on his part to commit a crime, and that he was convicted on circumstantial evidence alone.

The prosecution grows out of the case of United States v. Julius Anthony Petro and Joseph John Sanzo, Criminal Case No. 20810 of this Court in which Petro and Sanzo were charged with robbery of a bank in Warren, Ohio with a sawed-off shotgun and revolver and relieving the bank of $71,000 in cash.

The robbery took place in broad daylight on August 14, 1952 at about 10:00 o'clock in the morning.

At the trial of the Petro-Sanzo case, Dr. Alexander V. Spaeth, a practicing physician of Cleveland, Ohio was subpoenaed as a defense witness on behalf of Sanzo, who was his patient, and was required to bring with him his "office records, files, documents and memoranda showing

your treatment of Joseph J. Sanzo beginning with August 12, 1952 to the present time, said records also to indicate treatment furnished and the number of visits made by patient to your office from August 12, 1952 to the present time."

The obvious purpose of Sanzo in subpoenaing Dr. Spaeth and his records was to establish the alibi that at the time of the bank robbery in Warren, Ohio, on August 14, 1952 at 10:00 o'clock a. m., he, Sanzo, was then being treated by Dr. Spaeth for a skin rash on his hand in the doctor's office in Cleveland, approximately 50 miles away from the scene of the robbery.

Dr. Spaeth was sworn as a witness at the Petro-Sanzo trial and testified that he first met and treated Sanzo at his office in Cleveland on August 12, 1952.

He testified from his medication record card (Gov't. Ex. 31) that he next saw Sanzo at his office on August 14, 1952 and he fixed the hour at 10:00 o'clock a.m. from an entry appearing in his appointment book (Gov't. Ex. 36). This was the exact time of the occurrence of the robbery in Warren with which his patient Sanzo was charged!

The medication card indicated on its face that the "4" of the stamped "August 14, 1952" was handwritten quite heavily in ink.

On cross-examination Dr. Spaeth testified as follows:

Q. You have got August 12. You have got August 14.

A. That's right.

Q. I want you to look at the record and indicate to the Court and jury,—in addition to the stamped date somebody has written over the stamped date on that particular day?

A. They have.

Q. Do you know what date was stamped over before that was written there?

A. It was the 14th.

Q. How do you know that?

A. It was put in by myself at the time of the visit. That happens often, the stamp is incomplete or fades, and I write over it.

Q. When did you do that?

A. At the time of the visit.

The gist of the charge in the perjury indictment was that Dr. Spaeth testified under oath that the stamped date on the medication card was August 14, 1952 when he knew that the date stamped thereon was August 18, 1952.

Joseph Tholl, a handwriting expert and George Mesnig, a special agent of the Federal Bureau of Investigation, testified in behalf of the Government that they examined the medication card under microscope and took many photographs of it using ultra violet and infra red rays for some of them; that there was a stamped "8" on the medication card underneath the inked "4"; that the stamped "8" was then written over by hand with an inked "8"; that a heavily inked "4" was then written over the "8"; that the inked "8" was of the same composition as the ink on the rest of the card; that the heavily inked "4" was of a different composition; that the difference in the composition of inks was clearly apparent by looking at the card with an infra red lamp.

They also identified the photographs which were received in evidence showing a rounded figure underneath the inked "4" which the jury might properly have concluded was an "8."

Defendant claims that the testimony of the witnesses Tholl and Mesnig was circumstantial evidence citing *Wakeley v. State*, 118 Nebraska 346.

In the *Wakeley* case the evidence of the handwriting expert was derived wholly from a "comparison of hands."

In other words, he drew an inference from admitted facts or circumstances.

In the case at bar, the evidence of the experts was far different. They examined the disputed area on the medication card under microscope and took photographs, even using ultra violet and infra red rays. They made enlargements of the photographs. Their examination was scientific. The evidence they offered was substantive in character.

In *Keeney v. Arp De La Gardee*, 212 Iowa 45, 235 N. W. 745 the court said:

> "By microscopic inspection, and by magnified photographs and sometimes by chemical tests, the expert may be able to discover and demonstrate the existence of facts which negative the genuineness of the signature. Such facts, when proved, become substantive evidence, rather than mere expert opinion." p. 749 Cf. *Boyd v. Gosser*, 78 Fla. 64, 82 So. 758, 6 A. L. R. 500.

In *United States v. Spaeth*, 218 F. 2d 361 (CA 6) Judge Stewart characterized the evidence of the witnesses Tholl and Mesnig as follows:

> "The expert witnesses in this case did substantially no more than testify what physical fact their more practiced eyes observed. As a trained musician may more readily distinguish a minute differentiation of pitch, so the jury would have been warranted in believing that these experts were able to see subtle differences of intensity. Their testimony as to their observation was therefore not circumstantial, and its credibility and weight were for the jury."

The medication card showed under date of August 12 that the patient Sanzo was to return for further treatment in six days, which would be August 18th. The card shows no treatment on the 18th although the doctor's

appointment book contained an entry that he had an appointment with Sanzo at 3:00 o'clock p.m. on that day, treated him and made a charge of $6.00 therefor. The Government claims that the alleged treatment shown on the card on August 14th actually took place on the 18th when Sanzo was supposed to return for treatment; that the date August 18, 1952 had originally been stamped on the card and thus corresponded with the appointment book entry until the doctor changed the date on the medication card to the 14th. By making the change, the medication card shows the treatment on the 14th and no treatment on the 18th although the appointment book shows that Sanzo received treatment on the 18th.

The medication card and the appointment book record constituted "documentary or written testimony springing from" the defendant. *United States v. Wood*, 1840, 14 Pet. 430, 39 U. S. 430, 10 L. ed. 527; *Dr. Alexander V. Spaeth v. United States*, 218 F. 2d 361, 363 (CA 6).

There was no way to read the mind of Dr. Spaeth to determine his intent at the time he inked in the "4" by hand on the medication card or when he testified in the Petro-Sanzo trial concerning which he was convicted of perjury.

His intent necessarily had to be determined from his acts in the light of all the facts and circumstances of the case. He was presumed by law to have intended the natural and probable consequences of his acts.

Whether or not the defendant had a wilful intent to commit perjury was solely a question of fact to be determined by the jury, under proper instructions, from all the evidence in the case, together with the inferences which might reasonably be drawn therefrom. Defendant concedes that the jury was correctly charged on the sub-

ject of intent. No objection was taken to the Court's charge prior to the submission of the case to the jury. See Rule 30, Federal Rules of Criminal Procedure; *United States v. Cioffi*, 242 F. 2d 473 (CA 2).

In order to convict the defendant of perjury the Government was required to prove, beyond a reasonable doubt, that defendant wilfully and contrary to his oath stated any material matter which he did not believe to be true. Title 18 Sec. 1621, U. S. C. A.

The defendant, of course, knew that he was subpoenaed to bring his records of treatment of his patient Sanzo, who was charged with the commission of a crime. The subpoena mentioned the date of the first treatment, August 12, 1952, and required the doctor to furnish information concerning his treatment and the number of visits.

On his direct examination in the Petro-Sanzo case, Dr. Spaeth was questioned concerning the dates of treatment. He was cross-examined extensively concerning dates and his attention was specifically called to the date of August 14, 1952, the stamped date and the inked "4." He was sent to his office by the Court to secure his appointment book which he had testified showed 10:00 o'clock a.m. as the hour of the August 14th visit. He testified further on direct and cross-examination after he had procured his appointment book.

To say that Dr. Spaeth did not know why he was called as a defense witness sounds incredible.

Defendant cites Wigmore on Evidence 3rd Ed. Vol. 2 Sec. 242 on the subject of intent. In the footnote appearing on page 39 the author quotes Reed, J. on *State v. Teeter*, 69 La. 718, 27 N. W. 485 as follows:

> "It often occurs in human experience that the mere fact that a particular act has been done affords the

best evidence of the motive or intention with which it was done. If one was to break and enter a building which was known to be on fire, the reasonable presumption from his act would be that his intention was either to attempt the extinguishment of the fire or the rescue of the property or persons within it. So if one was to be found in the night time in the act of breaking into a building in which money or property of great value was deposited, his act would give very strong evidence indeed of the motive or purpose which prompted it."

The Court of Appeals held that the evidence in the first trial was sufficient to support the verdict. Judge Stewart said:

"It is next argued that there was insufficient evidence to support the verdict, in that the stringent degree of proof which is necessary to establish perjury was not met. The rule is that the falsity cannot be proved by circumstantial evidence alone nor by the uncorroborated testimony of one witness. *Weiler v. United States*, 1945, 323 U. S. 606, 65 S. Ct. 548, 89 L. Ed. 495; *Hammer v. United States*, 1926, 271 U. S. 620, 46 S. Ct. 603, 70 L. Ed. 1118; *Radomsky v. United States*, 9 Cir., 1950, 180 F. 2d 781; *Allen v. United States*, 4 Cir., 1912, 194 F. 664, 39 L. R. A., N. S., 385. The proof in this case contained neither defect. The questioned writing itself, as revealed by the photographs, was directly, and not circumstantially, probative of the falsity of appellant's oath, and since this was in essence 'documentary or written testimony springing from' the appellant, there was no failure to meet the required standards of proof. *United States v. Wood*, 1840, 14 Pet. 430, 39 U. S. 430, 10 L. Ed. 527."

It is not believed that the evidence at the third trial was substantially different from the evidence at the first trial.

Motive is not a necessary element of the crime of perjury. 70 C. J. S. 476 Sec. 18.

Proof of motive does not establish guilt nor want of proof of motive establish innocence. If the guilt of the defendant be shown beyond a reasonable doubt, it is immaterial what the motive for the crime, or whether any motive be shown, but the presence or absence of motive is a circumstance which the jury may consider as bearing upon the intent of the defendant. *Radio Officers' Union of Commercial Telegraphers Union, A. F. L. v. National Labor Relations Board*, 347 U. S. 17, 44, 45; *United States v. Schneiderman*, 106 F. Supp. 906; *Fabian v. State*, 97 O. S. 184. The jury was so instructed.

It is next contended that the Court erred in not admitting in evidence a number of other medication cards of the doctor of different dates and involving patients other than Sanzo.

What the doctor did or failed to do with respect to the medication cards of other patients was not relevant to the issues here. The issue here is what the doctor did to Sanzo's medication card. The evidence did not disclose the circumstances under which entries were made on the other cards. The admission of other cards in evidence would have resulted in a trial of issues with respect to each card, introduced collateral matters, complicated the issues, prolonged the trial and confused the jury. Under the circumstances, even if the cards of other patients had been relevant (which they were not here) the Court would have been fully justified, in the exercise of its discretion, in not admitting them in evidence. 1 Wigmore on Evidence Sec. 29a.

Defendant further claims that the medication card (Gov't Ex. 31) was unlawfully seized by the Government during the Petro-Sanzo trial and that his constitutional rights were violated.

The contention grows out of the fact that at the Petro-Sanzo trial Dr. Spaeth, on direct examination, was testifying from his records and on cross-examination the Government had his medication card marked Government's Exhibit 31 and it was received in evidence. On the same day, a Government agent obtained the exhibit from the Clerk, took it to Washington where it was examined and photographed by a special agent of the Federal Bureau of Investigation who immediately returned it to the Clerk. The special agent testified at the Petro-Sanzo trial as to the results of his examination.

It would have been better practice for the Government to have obtained an order of court authorizing the removal of the exhibit for the purpose of examination. Such an order would have been granted by the court as a matter of course. The failure to apply for and obtain the order did not make the previously admitted exhibit any the less admissible nor would it furnish a defense for perjury if committed at the trial.

The exhibit was not in the possession of the defendant when the Government received it from the Clerk. He had relinquished the possession of it when it was marked as an exhibit and received in evidence. While complaint might have been made by the Court concerning the removal of the exhibit, no prejudice resulted to this defendant. Cf. *Johnson v. United States*, 228 U. S. 457; *Burdeau v. McDowell*, 256 U. S. 465.

The point was previously raised without success in *Sanzo v. United States*, 210 F. 2d 49 (CA 6).

Finally, it is contended that a new trial should be granted on the ground of newly discovered evidence.

This so-called newly discovered evidence relates solely to impeaching the witness Estelle Bulkley who was

called by the Government. The witness had testified about a collateral matter, namely, the doctor's receipt books.

One of the impeaching affidavits is from the defendant himself. It states facts concerning which the defendant had knowledge and could have testified at the trial, but he chose not to take the witness stand. He was, of course, not required to become a witness in his own behalf and was privileged to stand on his constitutional rights. He ought not to complain, however, concerning his failure to offer impeaching evidence when he had full opportunity to do so.

Certainly, there is not sufficient showing that this evidence could not with reasonable diligence have been discovered and produced at the trial. Nor does it appear that such impeaching evidence would have affected the result of the trial had it been offered.

It is too late after verdict to impeach a witness by affidavit where the defendant had full opportunity to present the evidence at the trial had he taken the witness stand.

The note from Dr. Vrooman S. Higby to Dr. Spaeth advising the latter of the unreliability of the witness Bulkley is dated April 25, 1953 which was almost four years before the present trial. Certainly, Dr. Spaeth knew all about her unreliability at the time of the trial, but he remained silent until after the verdict.

In any event, a new trial ought not to be granted on the ground of newly discovered evidence of an impeaching character which tends merely to affect the weight or credibility of the evidence. *State v. Petro*, 148 O. S. 505; *Grant County Deposit Bank v. Greene*, 200 F. 2d 835 (CA 6).

The motion of defendant for judgment of acquittal and in the alternative for a new trial is overruled.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ON FIRST APPEAL (NO. 12180).

(Jan. 25, 1955.)

STEWART, *Circuit Judge:*

In the trial of two persons accused of bank robbery, appellant, a practicing physician, testified that he had treated one of the accused in his office at ten A. M. on August 14, 1952, which was the date and approximate time of the robbery. He based this testimony on his office records. On cross-examination the government called appellant's attention to the fact that the "4" of the "August 14" on his records was handwritten quite heavily in ink, whereas the remainder of the date was stamped. In explanation, appellant testified that the date originally stamped on the record was the 14th and that the same handwritten figure "was put in by myself at the time of the visit. That happens often, the stamp is incomplete or fades, and I write over it."

Appellant was subsequently indicted, tried and convicted of perjury, on the ground that the original stamped date was August 18, and that he knew this to be so at the time he falsely testified otherwise. 18 U. S. C. 1621. This appeal followed.

At the trial of this case various enlarged photographs of the writing in question were admitted in evidence. These showed what appeared to be a round-bodied figure underlying the "4," and were such that the jury could properly have concluded from them that the "4" had been superimposed on an "8." Two government witnesses were qualified as experts in examining such documents, and testified, over objection, that in their opinion the handwritten "4" had been superimposed on an "8." In addi-

tion, the government's case included evidence of a number of corroborating circumstances.

(1) Appellant's first contention on this appeal is that the opinions of the expert witnesses as to the existence of a figure "8" under the "4" should have been excluded as invading the province of the jury. That argument was rejected by the Supreme Court in *United States v. Johnson*, 1943, 319 U. S. 503, 519, 63 S. Ct. 1233, 1241, 87 L. Ed. 1546, with the comment that it "tacitly assumes that juries are too stupid to see the drift of evidence. * * * So long as proper guidance by a trial court leaves the jury free to exercise its untrammeled judgment upon the worth and weight of testimony, and nothing is done to impair its freedom to bring in its verdict and not someone else's, we ought not be too finicky or fearful in allowing some discretion to trial judges in the conduct of a trial and in the appropriate submission of evidence within the general framework of familiar exclusionary rules." Applying this language to the present case, we find no merit in the appellant's contention, in view of the court's correct instructions to the jury in this regard.

(2, 3) It is next argued that there was insufficient evidence to support the verdict, in that the stringent degree of proof which is necessary to establish perjury was not met. The rule is that the falsity cannot be proved by circumstantial evidence alone nor by the uncorroborated testimony of one witness. *Weiler vs. United States*, 1945, 323 U. S. 606, 65 S. Ct. 548, 89 L. Ed. 495; *Hammer v. United States*, 1926, 271 U. S. 620, 46 S. Ct. 603, 70 L. Ed. 1118; *Radomsky v. United States*, 9 Cir., 1950, 180 F. 2d 781; *Allen v. United States*, 4 Cir., 1912, 194 F. 664, 39 L. R. A., N. S., 385. The proof in this case contained neither defect. The questioned writing itself, as revealed by the

photographs, was directly, and not circumstantially, probative of the falsity of appellant's oath, and since this was in essence "documentary or written testimony springing from" the appellant, there was no failure to meet the required standards of proof. *United States v. Wood*, 1840, 14 Pet. 430, 39 U. S. 430, 10 L. Ed. 527.

(4) Appellant further claims error in the court's refusal to instruct the jury that if appellant had sworn falsely "inadvertently, inconsiderately, or carelessly," or "with a mistaken but honest belief as to the truth of his testimony," then he must be acquitted. While such an instruction would have been proper, the court adequately covered the point by instructing the jury that willfulness in testifying falsely was "probably the essence of the offense," and by defining "willfully" to mean "knowingly and intentionally, done with corrupt design or purpose." Moreover, the requirement of willfulness was repeatedly adverted to by the court throughout the charge.

The remaining questions on this appeal are concerned with whether the court properly instructed the jury as to the stringent burden of proof peculiar to perjury cases. Appellant submitted four requested instructions, set out in the margin,[1] relevant to the rule that circumstantial evidence alone is insufficient to establish the offense of perjury, as also is the uncorroborated testimony of one witness.

All four of these requested instructions were refused. The court charged the jury that the burden was "upon the United States to establish his guilt beyond a reasonable doubt by clear, convincing and direct evidence." The jury was also charged that the introduction of documentary evidence "does not dispense with the requirement that such evidence be direct and positive as

distinguished from circumstantial or negative." Other than these two passages, the jury was told nothing concerning the unique burden of proof obtaining in a perjury case, nor of the meaning of the terms direct and circumstantial evidence.

(5-7) The law is clear that appellant was entitled to an instruction on the extraordinary burden of proof in perjury cases. *Weiler v. United States,* 323 U. S. 606, 65 S. Ct. 548, 549, 89 L. Ed. 495. That case expressly reaffirms that "The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment." The case also clearly holds that "It is the duty of the trial judge, when properly requested, to instruct the jury on this aspect of its function, in order that it may reach a verdict in the exercise of an informed judgment." The *Weiler* opinion makes clear that this duty exists without regard to the number of prosecution witnesses who may have actually testified; that it is the function of the jury, not the court, to determine whether the standard has been met.

In the *Weiler* case, as in the present case, more than one witness actually gave testimony on behalf of the prosecution. In that case, as in this, there was in fact direct documentary evidence of perjury originating with the appellant himself. See Court of Appeals opinion in the *Weiler* case, 3 Cir., 143 F. 2d 204, 209. There, as here, it was argued to the court that, in view of the record, the failure to instruct on the "two witness rule" did not prejudice the appellant. Nevertheless, the Supreme Court reversed the judgment of conviction because of the trial court's failure to so charge.

(8) Whatever our independent judgment might otherwise be, we conclude that *Weiler v. United States* determines the question, and requires reversal of this conviction for a new trial.

The fact that two of the requested instructions were not completely accurate statements of the law did not operate to forfeit appellant's right to have the jury properly instructed on the points raised by the requests. Request No. 9 failed to define "direct evidence" broadly enough to include documentary as well as testimonial evidence, and the second sentence of request No. 18 would have improperly restricted the jury from basing a conviction on direct documentary evidence "springing from" appellant. *United States v. Wood, supra;* see *Maragon v. United States*, 1950, 87 U. S. App. D. C. 349, 187 F. 2d 79. In the *Weiler* case itself, as was pointed out in the *Maragon* case, the request which was denied contained the same defect as appellant's request No. 18 in this case. See also *Fraser v. United States*, 6 Cir., 1944, 145 F. 2d 145, 152. Moreover, requests Nos. 10 and 11, dealing with circumstantial evidence, contained no such defect, and in this case instruction on that aspect of the law was probably as important.

(9) It only remains to comment upon appellant's contention that his requested instruction that "opinion evidence is in the nature of circumstantial evidence" should have been given. While it may often be true that opinion evidence involves the witness's making an inference on the basis of established circumstances, that was not the case here. The expert witnesses in this case did substantially no more than testify what physical fact their more practiced eyes observed. As a trained musician may more readily distinguish a minute differentiation of pitch, so the

jury, would have been warranted in believing that these experts were able to see subtle differences of intensity. Their testimony as to their observation was therefore not circumstantial, and its credibility and weight were for the jury. For that reason, this request was properly denied.

The points covered by the four requested instructions concerning the higher quantum of proof required in perjury cases should have been included in the court's charge, and for that reason the judgment is reversed and the case remanded for a new trial.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ON SECOND APPEAL (NO. 12669).

(May 1, 1956.)

MARTIN, *Circuit Judge.*

This is the second appeal by Dr. Alexander V. Spaeth from a judgment of conviction and sentence on the verdict of a jury, finding him guilty of perjury.

The opinion of this Court on the first appeal, reversing the judgment of the district court and remanding the case for a new trial, is published in 6 Cir. 218 F. 2d 361. We held, among other things, that the defendant was entitled to an instruction based on *Weiler vs. United States*, 323 U. S. 606, 65 S. Ct. 548, 89 L. Ed. 495, to the effect that, in prosecutions for perjury, the uncorroborated testimony of one witness is insufficient to establish the falsity of the testimony of the accused set forth in the indictment. We declared the rule to be that, in perjury cases, the falsity of the testimony cannot be proved by circumstantial evidence alone.

In the instant controversy, appellant asserts that the trial judge incorrectly charged the jury that: "Circum-

stantial evidence alone, when it satisfies the minds of the jury beyond a reasonable doubt, is sufficient to warrant conviction." But the judge also charged the jury that the element of falsity must be established, either by the testimony of two witnesses, or by that of one witness and other corroborating facts or circumstances to satisfy the jury beyond reasonable doubt that the statements of the defendant under oath were in fact false.

(1, 2) It is true, of course, that a reviewing court should not pick out one erroneous paragraph of a long charge and reverse upon it, if, upon consideration of the entire charge, it appears that the jurors were correctly instructed as to the applicable law in such manner as to leave no confusion in their minds. We cannot say that the jurors here may not have been confused by the conflicting statements as to the unique and stringent burden of proof to be carried by the Government in perjury cases; but we do not base reversal upon that proposition. We suggest, however, that, upon a re-trial, there shall be omitted from the charge the statement that a conviction is warranted upon circumstantial evidence alone, when it satisfies the minds of the jury beyond a reasonable doubt as to the guilt of the accused.

(3) The judgment of the district court must be reversed and a new trial granted for the reason that it was reversible error to shut off the cross-examination of Joseph John Sanzo, in whose behalf Dr. Spaeth had testified as an alibi witness. Sanzo was convicted of the crime of bank-robbery, notwithstanding the testimony of Dr. Spaeth.

On direct examination by the Government attorney at Dr. Spaeth's trial, Sanzo identified the defendant in the court room and testified that the witness had not been in the doctor's office on August 14, 1952; and that he recalled

the particular date for the reason that it was the day on which he had been "picked up" on his "case." On cross-examination by defendant's attorney, Sanzo was not permitted by the court to testify that he had been tried in the federal court for a crime; what the "case" was which he had mentioned in his direct testimony; whether he had appeared as a witness in his own behalf; whether he was in Cleveland on August 14, 1952; and whether he knew a man named Harry K. Peterson. The record shows that the attorney for defendant Spaeth, out of the hearing of the jury, offered to prove that, if permitted to answer, the witness, Sanzo, would have testified that he had been tried for the crime of bank-robbery, had been "Picked Up" on August 14, 1952, for that crime; that he had been in Cleveland on August 14, 1952; that he had not testified in his own behalf; that he had been sentenced in 1952; that he was confined in a federal institution; and that he had produced as a witness at his trial Harry K. Peterson who testified that Sanzo had been in Cleveland on August 14, 1952, thus making Peterson another alibi witness.

The attention of the district judge was not directed by the attorney for the defense (nor has our attention been called) to the opinion of this Court in *Sandroff vs. United States*, 6 Cir., 158 F. 2d 623, 629, 630. There, we held that the trial judge committed reversible error in shutting off cross examination of a co-conspirator of the defendants on the question of promised or expected immunity and in refusing to permit cross examination of the witness as to why he and his son—though named as co-conspirators—had not been included as defendants in the indictment. We stated that an earlier decision and opinion of this Court in *Farkas vs. United States*, 6 Cir., 2 F. 2d 644, 647; was directly in point and clearly compelled reversal of the judg-

ment of the district court in the *Sandroff* case and remand of the case for a new trial.

Our opinion in the *Farkas* case, *supra*, declared that it was entirely proper on cross-examination of a witness "to show a belief or even only a hope on his part that he will secure immunity or a lighter sentence, or any other favorable treatment, in return for his testimony, and that, too, even if it be fully conceded that he had not the slightest basis from any act or word of the district attorney for such a belief or hope."

In the *Sandroff* opinion, *supra*, we pointed out that the Supreme Court had held in *Alford vs. United States*, 282 U. S. 687, 692, 693, 694, 51 S. Ct. 218, 220, 75 L. Ed. 624, that the defense has the right to show by cross-examination that the testimony of a prosecuting witness was affected by fear or favor growing out of his detention. We stated, further, that the ruling of the trial court cutting off in limine all inquiry as to whether the testimony of the witness was biased "because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution," had been held to be an abuse of discretion and to constitute prejudicial and reversible error. We called attention, too, to the fact that the opinion of this Court in the *Farkas* case had been cited three times in the opinion of the Supreme Court in the *Alford* case; and that Mr. Justice Stone had stated the essence of a fair trial to be that reasonable latitude be given a cross-examiner. We quoted his assertion that: "To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial."

We consider the principle of the *Farkas*, *Alford* and *Sandroff* cases to be directly applicable here and to compel reversal. The testimony of the convicted bank-robber Sanzo, that he had not been in the office of Dr. Spaeth on August 14, 1952, was in direct contradiction of the doctor's testimony in support of Sanzo's attempted proof of an alibi and was highly prejudicial to the doctor upon his trial for perjury. Indeed, the testimony of Sanzo was probably most influential in bringing about the appellant doctor's conviction.

The defense should have been permitted to subject Sanzo to rigid cross-examination. Sanzo had turned against his witness whose testimony—if believed—would have caused him to be acquitted of the charge of bank-robbery; for, had he been in the doctor's office on the morning of August 14, 1952, he could not have committed the crime of bank-robbery at Warren, Ohio, on that date. In all the circumstances, it would have been proper to permit careful scrutiny of Sanzo's motive for testifying against Dr Spaeth. His testimony could well have been guided by his hope of an early parole as a reward for becoming a Government witness against appellant. It is not intended remotely to convey the impression that the United States Attorney might have promised Sanzo a recommendation for parole as a consideration for his testimony. Mere hope upon the part of Sanzo that he would be so rewarded would supply sufficient motive for his testimony against Dr Spaeth.

In our judgment, cross-examination is generally an even more effective factor in revealing truth than is the oath of a witness. While the slogan that cross-examination should be limited to the subject matter brought out by direct-examination may be accepted as a generalization, cross-examination in the interest of substantial justice

seeking to elicit relevant truth should not be narrowly curtained.

The judgment of conviction and sentence is reversed and the cause is remanded to the United States District Court for a new trial.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ON PRESENT APPEAL (NO. 13381).

(Decided April 22, 1958.)

Before SIMONS, Chief Judge; MARTIN and STEWART, Circuit Judges.

PER CURIAM. This is the third time the appellant, Dr. Alexander V. Spaeth, has appealed to this Court from a judgment of conviction and sentence on the verdict of a jury. This Court reversed the judgment of the district court and remanded the case for retrial on the two former convictions. The first judgment of conviction and sentence was reversed and the case remanded on the refusal of the district judge to give instructions relevant to the rules that circumstantial evidence alone is insufficient to establish the commission of the offense of perjury and that the uncorroborated testimony of a single witness is insufficient to establish the falsity of testimony. This was said to be true, even though two of the requested instructions were not completely accurate and irrespective of the number of prosecuting witnesses who actually testified. *Spaeth vs. United States*, 218 F. (2d) 361 (C. A. 6).

The judgment of conviction and sentence of appellant on the second trial was reversed for the action of the district court in shutting off cross-examination of a bank robber in testifying against appellant, who had attempted to provide an alibi for the bank robber. We pointed out

that the testimony of the convicted robber against his alibi witness "could well have been guided by his hope of an early parole as a reward for becoming a Government witness against appellant." *Spaeth vs. United States*, 232 F. (2d) 776 (C. A. 6).

On this appeal, we find no merit in the contention of appellant that it was reversible error for the district court to deny appellant's motions for transfer under Rule 19 and for change of venue under Rule 21(a) of the Federal Rules of Criminal Procedure (Title 18, U. S. C. A.). The record reveals no showing that appellant was remotely prejudiced by the transfer of the case for trial at Youngstown, Ohio, instead of at Toledo, Ohio, as requested by appellant. We find no force in the argument of appellant that the government failed to establish the criminal intent of appellant in testifying to a wilful falsehood sufficient to establish perjury. We think our opinion upon the first appeal of the case has adequately rejected that argument then made to the same effect. *Spaeth vs. United States, supra*. There was no error in the rejection of evidence proffered by appellant in the form of numerous medication cards involving patients, including Sanzo for whom appellant testified as an alibi witness. The proffered evidence was not relevant to the issue in the case on trial and its admissibility would have been collaterally inconvenient to receive, requiring proof of circumstances relating to changes made in the irrelevant medication cards. We find no merit in any of the other assignments of error made by appellant.

Appellant has been three times convicted by jury verdicts for perjury in the *Sanzo* case. The judgments of conviction and sentence in the first two trials were reversed upon grounds which in no manner gainsaid his

guilt. There being no reversible error found in the record in the instant case, the judgment of conviction and sentence is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed April 22, 1958.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of conviction and sentence of the said District Court in this cause be and the same is hereby affirmed.